

JUN 8 1977

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States*October* Term, 1976

Docket No.

76-1741

FORMAN & ZUCKERMAN, P.A.,

Plaintiff-Respondent,

v.

DONALD SCHUPAK, ERIC D. ROSENFELD, and PETER D.
FISCHBEIN, Individually, and partners trading as SCHUPAK,
ROSENFELD & FISCHBEIN,*Defendants-Appellants.*On Appeal from the Court of Appeals
of the State of North Carolina**JURISDICTIONAL STATEMENT**DONALD SCHUPAK, ERIC D. ROSENFELD,
and PETER D. FISCHBEIN, Individually, and
partners trading as SCHUPAK, ROSENFELD
& FISCHBEIN, appearing *pro se*
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INDEX

	<u>PAGE</u>
Opinions Below.....	1
Jurisdiction.....	2
Constitutional and Statutory	
Provisions Involved.....	3
Questions Presented.....	4
Statement.....	4
How the Federal Questions Were	
Raised and Decided Below.....	6
The Federal Questions are	
Substantial.....	7
Conclusion.....	11

CITATIONSCases

<u>Great Northern Railway Co. v.</u>	
<u>Thompson</u> , 304 F.Supp. 812	
(D.C.N.D. 1969).....	10
<u>International Shoe Company v.</u>	
<u>Washington</u> , 326 U.S. 310,	
66 S.Ct. 154 (1945).....	7
<u>State v. Rasmussen</u> ,	
213 N.W. 2d 66 (1973).....	10
<u>United Advertising Agency, Inc.</u>	
<u>v. Robb</u> , 391 F.Supp. 626	
(U.S.D.C., M.D. N.Caro. 1975)..	8

Statutes

N.Caro. G.S. 1-75.4(5).....	2, 3, 4,
	6, 9, 11
28 U.S.C. §1257(2).....	2

CITATIONS (Cont'd.)

	<u>PAGE</u>
28 U.S.C. §2103.....	2
United States Constitution, Article I Section 8.....	3, 4, 9, 10
Amendment V.....	3, 4, 10, 11
Amendment XIV.....	3, 4, 7, 10, 11

IN THE SUPREME COURT OF THE
UNITED STATES

Term, 1977

No.

FORMAN & ZUCKERMAN, P. A.,

Plaintiff-Respondent,

v.

DONALD SCHUPAK, ERIC D. ROSENFELD,
and PETER D. FISCHBEIN, Individually,
and partners trading as SCHUPAK,
ROSENFELD & FISCHBEIN,

Defendants-Appellants

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NORTH CAROLINA
JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Court of Appeals
of the State of North Carolina and the
North Carolina General Court of Justice,
Superior Court Division, are as yet unre-
ported, but are set forth in the Appendix
beginning at page A1 at the end of this
Jurisdictional Statement.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2). This proceeding challenges the use and application by the North Carolina Court of Appeals to the Appellants of the North Carolina "long-arm" statute G.S. 1-75.4(5).

The North Carolina Court of Appeals rejected Appellants' challenge to the constitutionality of the application of the aforementioned statute and this appeal is brought as of right. The judgment sought to be reviewed was filed in the North Carolina Court of Appeals on October 6, 1976. The Appellants filed a Notice of Appeal and a Petition for Discretionary Review in North Carolina Supreme Court on November 10, 1976. The Appeal was dismissed and the Petition denied by the North Carolina Supreme Court on March 10, 1977. The Notice of Appeal herein was filed on May 5, 1977 in the Court of Appeals of North Carolina.

In the event that this Court considers that a proper mode of review in this action is not by appeal, but rather by petition for certiorari, then the Appellants respectfully request that pursuant to 28 U.S.C. §2103, the papers whereon this appeal was taken be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Court at the time the appeal was taken.

Constitutional and
Statutory Provisions

This action involves Article I Section 8 and the Fifth and the Fourteenth Amendments to the Constitution of the United States.

The following is the portion of the North Carolina statute which is in question herein. It may be found in North Carolina General Statutes, Ch. 1 Civil Procedure, page 137:

"§1-75.4 Personal jurisdiction, grounds for generally.--A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

(5) Local Services, Goods or Contracts.--In any action which:

- a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
- b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for

the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant...."

Questions Presented

Is the exercise of in personam jurisdiction by the North Carolina courts over the Appellants pursuant to N.C.G.S. §1-75.4(5) consistent with the requirements of due process arising under Article I Section 8 and the Fourteenth and Fifth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

The Appellant, Schupak, Rosenfeld & Fischbein, was retained in 1974 by the Munchak Corporation, a Georgia corporation ("Munchak") and the owners of an American Basketball Association franchise known as the Spirits of St. Louis, to represent it and co-ordinate certain litigation brought by Munchak against William Cunningham, a professional basketball player. The Carolina Cougars (the predecessor to the Spirits of St. Louis) had previously sued Cunningham in North Carolina, and the basketball team had used Respondent as its counsel in that litigation. Thus, when the Spirits of St. Louis decided to commence suit against Cunningham in North Carolina and they needed to retain North Carolina counsel to do so, the Appellants, who were Munchak's General Counsel, contacted the Respondent to commence such litigation on behalf of the basketball

team. Appellants were not parties to the litigation and their only contact with Respondent was when working with them on behalf of a client they were both representing in a lawsuit. At no time did Appellants request or authorize the Respondent to do any legal work for the Appellants. Indeed, Appellants were not being sued and had no need for such representation. Respondent's bills were tendered to the basketball team for work done for the team and not to Appellants since no work was performed for the Appellants.

At the conclusion of the litigation with Cunningham, Respondent presented its bill to the basketball team (Munchak). Unfortunately, a fee dispute developed and the bill was not paid. When attempts at settlement proved unsuccessful, Respondent commenced this action to recover its fees not from its client, but, for some strange reason, from the Appellants. The Appellants never promised to pay Respondent for the services it was to perform for Munchak. In fact, the Respondent has not even stated in any of its opposition papers or its complaint that any of the Appellants did promise to pay Respondent.

Respondent has alleged that, as a law firm, it performed services within North Carolina for the Appellants and, therefore, the "long-arm" jurisdiction provisions of the North Carolina General Statutes are applicable.

The Appellants respectfully contend that the application to them by the Court

of Appeals of North Carolina of N.C.G.S. §1-75.4(5) offends traditional notions of fair play and substantial justice, places an undue burden on the free flow of interstate commerce, denies Appellants of a trial on the merits, and deprives Appellants of their property in violation of the due process clause of the United States Constitution.

How the Federal Questions Were
Raised and Decided Below

On October 6, 1975, Respondent commenced the instant action against the Appellants who are New York attorneys and a New York law partnership by filing the summons and complaint in the North Carolina Superior Court. All of the Appellants were served through the mail at their business address in New York City. The Appellants responded pro se and made a motion to dismiss for lack of in personam jurisdiction. The Appellants raised their constitutional due process claims at that time. The motion was submitted to the court without oral argument to the Hon. William Z. Wood, County Superior Court Division of the General Court of Justice. The motion was denied by an Order dated January 30, 1976; the Appellants appealed from that Order to the North Carolina Court of Appeals and again raised their constitutional arguments. The appeal was submitted August 26, 1976. On October 6, 1976, the North Carolina Court of Appeals affirmed the denial of Appellants' motion and stated at page 5 of its decision that ". . . this lawsuit 'does not offend "tra-

ditional notions of fair play and substantial justice.'" The Appellants appealed this Order and petitioned for discretionary review to the Supreme Court of North Carolina. On March 7, 1977, the Supreme Court of North Carolina dismissed the appeal ex mero motu and denied the petition for discretionary review.

The Federal Questions
Are Substantial

Point I

The Exercise of Jurisdiction of Appellants by the North Carolina Courts Does Not Meet the Requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

As set forth in International Shoe Company v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945), in order for North Carolina to exercise in personam jurisdiction over the non-resident Appellants certain "minimum contacts" of the Appellants with North Carolina must exist. Most importantly, the exercise of jurisdiction must be consonant with the due process tenets of "fair play" and "substantial justice."

The Appellants acted out of their New York office, solely as General Counsel for Munchak. Their relationship with the Respondent was in a supervisory capacity, in fulfillment of their obligation and responsibility to Munchak to ensure that Munchak was adequately represented in

North Carolina. In order to better review the work being done by Respondent, on three occasions Peter D. Fischbein, on of the Appellants herein, met with the Respondent in North Carolina. This meager contact with the state does not constitute a "substantial connection" with North Carolina consistent with federal due process requirements. Neither can the amount involved in this action create a "substantial connection" with North Carolina of the Appellants.

The amount involved in this action is \$5,734.62. In United Advertising Agency, Inc. v. Robb, 391 F. Supp. 626 (U.S. District Court, M.D.N. Carolina, 1975) the District Court stated that a contract. . . "alleged to be worth over \$13,000.00, which while significant, does not manifest a transaction where size alone would indicate substantial contacts." 391 F. Supp. 630. The exercise of in personam jurisdiction over the non-resident defendant in that case was determined not to be consistent with the principles of due process and the action was dismissed, as it should be herein.

The application of the North Carolina "long arm" statute set forth above to the Appellants can only offend "traditional notions of fair play and substantial justice," and serve as a deterrent on the practice of law and representation of large corporations, not only in North Carolina, but also nationwide. The Appellants herein should not be forced to submit to the jurisdiction of North Carolina

based upon their minimal contacts with the state.

Point II

The Application of the North Carolina "Long-Arm" Statute by the Court of Appeals to the Appellants in This Action is Unconstitutional Because it Places an Undue Burden on the Free Flow of Interstate Commerce and Violates Article 1 Section 8 of the United States Constitution.

In order to affirm the decision of the trial court, the North Carolina Court of Appeals decided that the Appellants, New York attorneys, promised to pay the Respondent, a North Carolina law firm, for its services rendered on behalf of Munchak in North Carolina, and further decided that these services were rendered for the Appellants even though Appellants were not parties to the lawsuit and acted merely as attorneys for Munchak in asking Respondent to act as local counsel for Munchak (nowhere in the record will it be found that Respondent actually states that Appellants agreed to pay Respondent). Whether such a construction of N.C.G.S. Section 1-75.4(5) is constitutional has not yet been determined.

If sustained, this decision of the North Carolina Court of Appeals will have a widespread deleterious impact on the practice of law throughout the country. Not only did the Court of Appeals decide that Appellants' request as General Counsel to the Respondent to represent Munchak

in North Carolina created a promise by Appellants to pay Respondent for its services, but also that Appellants are subject to suit in North Carolina. The logical extension of this decision is that all outside counsel for a party litigant in North Carolina will now be personally liable for local counsel's fees if the party litigant fails to pay even when there is no express undertaking to pay by outside counsel.

Such a burden upon the practice of law is unreasonable and far outweighs any benefit to be gained by implying such a promise to pay and subjecting non-resident outside counsel to suit in North Carolina by local counsel for its fees. Great Northern Railway Co. v. Thompson, 304 F. Supp. 812 (D.C.N.D. 1969); State v. Rasmussen, 213 N.W. 2d 66 (1973). To hold the Appellants liable to Respondent under the facts of the instant case would be an unconstitutional burden on interstate commerce in violation of Article 1 Section 8 of the United States Constitution.

Point III

The Decision of North Carolina Court of Appeals Denied Appellants of a Trial on the Merits and Deprived Appellants of Their Property in Violation of the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

The opinion of the North Carolina Court of Appeals appears to decide con-

clusively that, on the record, Appellants are liable as a matter of law to Respondent and that no trial is required as to whether, in fact, Appellants promised to pay Respondent for its legal services rendered on behalf of Appellants' client. Such a finding is required under the North Carolina "long-arm" statute in order to sustain jurisdiction over the Appellants. The North Carolina Court of Appeals decision has in fact deprived Appellants of a trial on the key issue in the case in order to sustain jurisdiction over the Appellants and has in effect legislated that an out-of-state law firm that entered North Carolina to retain counsel on behalf of a client becomes liable per se whether or not that out-of-state law firm agreed to be liable for North Carolina counsel fees. This interpretation and extension of North Carolina G.S. Section 1-75.4(5) is not warranted by statute, prior law decisions and is unconstitutional as it deprives Appellants of their day in court and a trial on the merits and must be reversed as violative of the Fifth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

It is respectfully submitted that the courts of the State of North Carolina may not exercise in personam jurisdiction over the Appellants in this action, the decisions of the North Carolina courts are unconstitutional and should be reversed, and this action should be dismissed as to all of the defendants.

It is respectfully suggested that this Court may find this case an appropriate one for reversal without further argument.

In the alternative, it is respectfully submitted that for the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

Peter D. Fischbein for
Schupak, Rosenfeld &
Fischbein, Donald
Schupak, Eric D. Rosen-
feld, and Peter D.
Fischbein, appearing
pro se.

No. 7618SC308

NORTH CAROLINA COURT OF APPEALS

Filed: 6 October 19⁹76

FORMAN & ZUCKERMAN, P.A.

v.

Guilford County
No. 75CVS6264

DONALD SCHUPAK, ERIC D.
ROSENFELD, and PETER D.
FISCHBEIN, Individually,
and partners trading as
SCHUPAK, ROSENFELD and
FISCHBEIN

Appeal by defendants from order of
Wood, Judge. Order entered 30 January 1976
in Superior Court, Guilford County. Heard
in the Court of Appeals 26 August 1976.

On 6 October 1975, plaintiff com-
menced this action against individuals
defendants, who are attorneys licensed to
practice in the State of New York, and
their partnership, to recover attorney
fees for services allegedly performed for
defendants. All defendants were served in
New York City by mail. On 6 November 1975,
defendants appeared pro se and moved to
dismiss the action on the grounds that the
North Carolina courts did not have in
personam jurisdiction over them. Both
parties supplied briefs and affidavits
and submitted the motion to the Superior
Court without oral argument.

Plaintiff's evidence tended to show

that in August 1974, defendants retained plaintiff law firm to perform legal services in cases then pending in United States District Court for the Middle District of North Carolina and in the United States Court of Appeals for the Fourth Circuit; that these services involved litigation between The Munchak Corporation (hereinafter called "Munchak"), a client of defendants, and William John Cunningham, a professional basketball player; that plaintiff's representation of Munchak continued through 19 December 1974; that during the entire period of representation, defendants solely directed all phases of the services performed and aided in the determination of what services were to be performed; that all motions, pleadings, briefs and responses were reviewed by defendants; that the work product resulting from plaintiff's services was approved and ratified by defendants; that on three separate occasions, defendant Peter D. Fischbein came into and remained in North Carolina, where he actively participated in the performance of legal services with plaintiff and attended hearings in this State; that all statements for plaintiff's services and costs were mailed to defendants pursuant to defendants' instructions; that on 3 September 1974, defendants paid to plaintiff the sum of \$2,293.50 by a check drawn on the partnership account and thereafter caused a Form 1099 to be filed with the Internal Revenue Service evidencing that defendants had in fact paid said sum and a copy of that form was attached to the affidavit as an exhibit; that all legal services were performed

at the express request of the defendants and no other person, firm or corporation; and that following partial payment by defendants, plaintiff is still entitled to the sum of \$5,734.62 representing the balance due for services performed.

Defendants' evidence tended to show that Munchak needed North Carolina counsel to represent it in certain litigation; that Munchak asked defendants to retain North Carolina counsel; that defendants contacted plaintiff and request representation in said litigation; that plaintiff accepted the engagement and agreed to bill Munchak in care of the defendants' address; that plaintiff did in fact send its statement to Munchak, care of defendants' address; that Munchak had advanced monies in 1974 to defendants, who in turn forwarded \$2,293.50 to plaintiffs for services rendered; that at no time did defendants ever promise to pay plaintiff for services performed for Munchak; and that plaintiff knew at all times that defendants were not responsible for fees for plaintiff's services.

On 30 January 1976, defendants' motion was denied by order of Wood, Judge, in Guilford County Superior Court. Defendants appeal from that order.

Forman & Zuckerman, P.A., by William Zuckerman, for plaintiff appellee.

Schupak, Rosenfeld & Fischbein, by Peter D. Fischbein, appearing pro se and for defendant appellants.

MORRIS, Judge. Defendants contend that their activity does not bring them within the scope of G.S. 1-75.4, one of North Carolina's so-called "long arm" statutes. We disagree.

G.S. 1-75-4. sets forth the general grounds for personal jurisdiction by the courts of North Carolina over a nonresident defendant and reads in pertinent part:

"A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

(5) Local Services, Goods or Contracts.---In any action which:

a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance was authorized or ratified by the defendant...."
(Emphasis supplied.)

Thus, if defendants promised to pay for plaintiff's services or if these services were actually performed for defendants with their authorization or ratification, the provisions of G.S. 1-75.4 would apply, and defendants would be subject to the in personam jurisdiction of the courts of this State. Defendants, however, deny that they requested or promised to pay for plaintiff's services and that services were performed for them. In other words, defendants maintain that they, as attorneys, were acting solely in their representative capacity and that their client was the party responsible for payment to plaintiff. We cannot agree.

In *Burt v. Gahan*, 351 Mass. 340, 220 N.E. 2d 817 (1966), a partnership of stenographic reporters employed to transcribe a pre-trial hearing sued the attorney personally to recover for services rendered. The issue was whether the attorney could be held responsible for such services ordered by him but without explicit agreement as to payment. In holding the attorney personally liable for these costs, the Court stated that

"While in a broad sense counsel may be an agent and his client a principal there is much more involved than mere agency. The relationship of attorney and client is paramount, and is subject to established professional standards. In short, the attorney, and not his client, is in charge of litigation, and is so recognized by the Court.

. . .

We therefore deem the just and equitable rule of law thus established to be that, in the absence of express notice to the contrary, court officials and persons connected, either directly or indirectly, with the progress of litigation, may safely regard themselves as dealing with the attorney, instead of with the client." 351 Mass. at 342-43, 220 N.E. 2d at 818-19.

We also find the case of *Meany v. Rosenberg*, 28 Misc. 520, 59 N.Y.S. 582 (1899), to be particularly enlightening on this point. In *Meany*, plaintiff's assignor was a Washington, D.C., attorney who was hired by defendant, a New York attorney, to defend one of defendant's clients in a lawsuit brought in Washington. The New York court held that an attorney, employed directly by another lawyer to defend a case for the latter's client, may recover for such services from the lawyer, even though the client would also have been liable. See also *Morris v. Silver*, 312 Ill. App. 472, 38 N.E. 2d 840 (1942). Applying these rules to the case now before us, we are of the opinion that plaintiff's claim arose out of a promise made by the defendants and involved services actually performed for the defendants which they authorized and ratified. Consequently, the contract between these parties falls within the provisions of G.S. 1-75.4(5)a. and b.

Defendants nonetheless contend that even if their activity comes within G.S. 1-75.4, application of that statute to them in this instant violates the due process requirements guaranteed by the United States Constitution. Again, we disagree. The constitutional limitation on the power of a court to acquire in personam jurisdiction over a nonresident defendant was set out in the landmark case of *International Shoe Co. v. McGee*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), where it was held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." 326 U.S. at 316, 90 L.Ed. at 102, 66 S.Ct. at 158. Provisions of the North Carolina long arm statutes represent a legislative attempt to assert in personam jurisdiction to the full extent permitted by the due process clause. *First-Citizens Bank & Trust Co. v. McDaniel*, 18 N.C.App. 644, 197 S.E. 2d 556 (1973). Here, defendants sought out plaintiff to assist them in performance of professional services for one of their clients by handling litigation in courts located in North Carolina; defendants supervised the work product of plaintiff; on at least three occasions, one of the defendants came to North Carolina where he attended hearings and otherwise directly participated in the legal services being performed. We believe that defendants, through their course of

conduct, had sufficient minimum contacts with North Carolina and that this lawsuit "does not offend 'traditional notions of fair play and substantial justice.'" The order is

Affirmed.

Judges VAUGHN and CLARK concur.

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINE
IN THE COURT OF APPEALS

FORMAN & ZUCKERMAN, P.A.

v.

No. 75 CVS 6264
NOTICE OF APPEAL

DONALD SCHUPAK, ERIC D.
ROSENFELD, and PETER D.
FISCHBEIN, Individually,
and partners trading as
SCHUPAK, ROSENFELD and
FISCHBEIN

DONALD SCHUPAK, ERIC D. ROSENFELD and
PETER D. FISCHBEIN, individually, and
partners trading as SCHUPAK, ROSENFELD and
FISCHBEIN, defendants, hereby appeal to
the Supreme Court of the United States
from the judgment of the North Carolina
Court of Appeals affirming the denial of
the defendants' motion to dismiss the
instant action for lack of in personam
jurisdiction. This judgment was entered
March 10, 1977 and the defendants are
appealing from this judgment pursuant to
28 U.S.C. §1257(2).

Dated: New York, New York
May 2, 1977

Peter D. Fischbein, for
SCHUPAK, ROSENFELD &
FISCHBEIN and Eric D.
Rosenfeld, Donald Schu-
pak and Peter D. Fisch-
bein, appearing pro se

555 Madison Avenue
New York, New York 10022

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jane Sillery, being sworn, says:
I am not a party to this action; I am over
18 years of age; I reside at 510 West
110th Street, New York, New York 10025.

On May 3, 1977 I served the within
Notice of Appeal upon Forman & Zuckerman,
P.A., the attorneys for plaintiff in this
action, at P.O. Drawer X-1, 724 Wachovia
Building, Greensboro, North Carolina 27402,
the address designated by said attorneys
for that purpose by depositing a true copy
of same enclosed in a postpaid, properly
addressed wrapper, in an official deposi-
tary under the exclusive care and custody
of the United States Postal Service within
the State of New York.

Jane Sillery

Sworn to before me this
3rd day of May, 1977